

NTSB Order No. EA-4177

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 1994

Docket SE-12416

for 15 days based on his alleged failure to discover during a pre-flight inspection that one of the aircraft's four fuel tank caps was either missing or improperly installed, in violation of 14 C.F.R. 91.13(a).³ For the reasons discussed below, respondent's appeal is denied.

On November 1, 1990, respondent served as first officer of a Beech 99 aircraft on a Part 135 commuter flight operated by Exec Express, Inc. The aircraft, which had made several previous flights that day, departed from Saint Louis International Airport after having been on the ground for approximately one hour, during which time it was refueled. Pursuant to the company's operations manual, it was respondent's duty as first officer to conduct a preflight inspection of the aircraft prior to its departure. (Exhibit A-9.) As specified in the applicable preflight inspection checklist (Exhibit A-11, excerpt from Beech 99 aircraft flight manual), respondent was required to inspect each of the aircraft's four fuel tanks⁴ and see that the cap on

(..continued)

commercial pilot certificate, but by the time of the hearing he had obtained an airline transport pilot rating. The suspension affirmed in this case will be imposed against the certificate currently held by respondent.

³ Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

⁴ The fuel tanks are located in the right and left wings, and in the right and left nacelles.

each tank was secure.⁵

Respondent testified that, as was his custom, he did a quick preflight inspection while the passengers were boarding⁶ to make sure that "everything was in place and that nothing had changed" since his first preflight inspection of the day, which he explained would have been "more thorough." (Tr. 149-51.)

Respondent stated that he did not physically touch the fuel tank caps -- explaining that due to the height of the nacelles (seven and a half feet, in respondent's estimation) he would have had to jump up to do so -- but that he did look up at the nacelles to insure that there were no "tabs" sticking up which would indicate an unsecured fuel cap.⁷ In addition, respondent testified that he looked out the cockpit window to make sure that the right side

⁵ Although the checklist items pertaining to the left wing tank, left nacelle tank, and right wing tank are followed by the instructions, "CHECK; Cap - SECURE," the entry relating to the right nacelle fuel tank (the tank at issue in this case) states only "CHECK," without specifying "Cap - SECURE" as do the other fuel tank entries. We agree with the FAA inspector and the law judge that this omission is merely a typographical error or oversight, and that respondent was put on notice by the checklist as a whole that he was required to check all four fuel tanks in the same manner, and to insure that the cap was secure on each one. While respondent points out the inconsistency, he does not claim that he was thereby misled into believing his inspection duty with regard to the right nacelle fuel tank and cap was any less than with regard to the other three tanks.

⁶ The flight log indicates that this flight carried four passengers. (Exhibit R-1.)

⁷ The record establishes that the fuel caps used on this aircraft have a hinged metal tab which -- when the cap is properly secured in the fuel tank opening -- is folded down onto the top of the cap so that it lies flush against the top of the cap. The cap itself is essentially flush with the exterior of the aircraft. Accordingly, an unsecured or improperly secured cap can be identified by a protruding tab.

of the aircraft was clear just prior to taxi, and noticed nothing abnormal on the nacelle. Although respondent conceded that the purpose of this visual check was not specifically to observe the fuel caps, he stated his belief that he would have noticed a missing fuel cap at that time. (Tr. 151.)

It is undisputed that, shortly after the aircraft started to taxi from the terminal, the cap from the right nacelle fuel tank was found rolling on the ground. One of the passengers seated on the right side of the aircraft became alarmed at seeing what he described as "a fountain of fuel" escaping from the uncapped fuel tank and called attention to the missing cap, at which point the aircraft was stopped.⁸ (Tr. 37-40.) After the cap was retrieved and installed with the help of ground personnel, respondent insured that it was securely fastened in place and the flight continued without incident. Respondent testified that the fuel cap remained in place for the remainder of his shift that day (two subsequent flights), and there is no indication in the record of any prior or subsequent mechanical problems with the cap.

The law judge found that the fuel cap was apparently replaced over the fuel tank opening after refueling and "nobody noticed anything out of the ordinary." (Tr. 183.) However, he held that the only reasonable inference to be drawn in this case was that the fuel cap, though in place, was not properly secured.

⁸ Estimates as to how far the aircraft taxied before coming to a stop varied from 150-250 yards (Passenger Von Furstenburg, Tr. 39-40) to 300 feet (pilot-in-command Renfro, Tr. 137).

(Tr. 183, 187.) Accordingly, he found that respondent had failed to perform an adequate preflight inspection so as to insure that the cap was secure, as required by the company operations manual and the Beech 99 preflight checklist, and that that failure resulted in potential endangerment to persons or property.⁹ Hence, he concluded that respondent had operated the aircraft in a careless manner, in violation of section 91.13(a). (Tr. 188.)

On appeal, respondent claims that there is no requirement to physically inspect the fuel tank caps, and cites our case law establishing that an enforcement action cannot lie under a generally worded regulation unless the specific duty allegedly violated is sufficiently defined.¹⁰ Respondent asserts that he

⁹ An FAA inspector testified that an uncapped fuel tank could allow fuel to escape, thus creating a risk of fire and/or explosion should it come into contact with electrical components of the aircraft, and could also lead to a possible loss of lateral balance due to rapid fuel loss once the aircraft became airborne. (Tr. 63-64.)

Because the regulation requires only potential endangerment, we need not resolve the dispute over precisely how much, if any, fuel actually escaped from the open fuel tank.

¹⁰ In Administrator v. Galloway, 1 NTSB 2104, 2198 (1972) we said:

In resolving the question of whether a specific act or omission is prescribed by a general regulation, facts beyond the face of the regulation -- e.g., duties and responsibilities imposed by manuals, standard operating procedures, and custom and practice -- can be considered. However, these factors, considered in conjunction with the regulation itself, must define a standard with sufficient specificity so that an airman has reasonable notice that failure to adhere thereto would subject him to punitive action by the Administrator.

fulfilled his preflight inspection duty by visually inspecting the fuel tank cap as he did, noting that visual inspection from inside the aircraft was one of the acceptable means of inspection cited by the FAA inspector in this case. Respondent also challenges the law judge's sanction analysis, arguing that he relied too heavily on Administrator v. Muzquiz, 2 NTSB 1474 (1975). He maintains that the 15-day suspension sought by the Administrator should be reduced in light of what he perceives to be mitigating factors.

There is no doubt that respondent had a duty to ensure, as part of his preflight inspection, that the right nacelle fuel cap was secure, and that this duty was defined in the operations manual and preflight checklist with sufficient specificity. (Exhibits A-9 and A-11.) The fact that a specific method for accomplishing this duty (such as physical inspection) is not spelled out in the documents relied on by the Administrator does not detract from respondent's obvious failure to fulfill that duty. We agree with the law judge that the only reasonable inference to be drawn from the circumstances in this case is that respondent failed properly to ensure the security of the cap.

The testimony in this case established that several options were available to respondent. The FAA inspector testified that, during his exterior inspection of the aircraft, respondent could have reached up and felt the cap with his hand, using a ladder if necessary, or even climbed up onto the aircraft wing so as to

(..continued)

See also Administrator v. Hart, 2 NTSB 1110 (1974).

reach the cap. (Tr. 60-61, 79.) Indeed, the fueller who refueled this aircraft testified that he had seen crewmembers reach up and touch fuel caps (Tr. 113), and the pilot-in-command of the subject flight testified that, as a first officer, he had often utilized a fuel truck ladder to climb up and check the security of the fuel caps.¹¹ (Tr. 140-41.) Although respondent claims that he looked up at the nacelle and saw no cap or tab sticking up, the cap itself was apparently not visible from his perspective. Accordingly, his exterior inspection was clearly insufficient to verify the presence and security of the fuel cap.

In the alternative, the FAA inspector stated that an adequate inspection could be accomplished from inside the aircraft by looking out the window and verifying that the cap was in place and the tab was flush with the aircraft. (Tr. 61.) The pilot-in-command testified that, as a first officer, he had relied on this method when a ladder was unavailable. (Tr. 141.)

Respondent maintains that he also employed this method of inspection on the date in question. However, we think the record supports the law judge's implicit finding¹² that, to the extent

¹¹ The company operations manual specifies that first officers are to monitor fueling operations to prevent certain enumerated hazards. (Exhibit A-10.) The record reflects some disagreement over whether this duty obligates a first officer to remain present during the entire refueling operation. Admittedly, respondent was present for only part of the refueling. However, we find it unnecessary to resolve the dispute over the scope of this manual provision, as respondent was not charged with any failure in this regard.

¹² See, e.g., Tr. 179: "[A] check of secure fuel caps must be done on each and every pre-flight . . . for each leg. On the testimony in front of me that type of pre-flight was not done."

respondent actually performed such an inspection, it was inadequate.¹³

Regarding sanction, we view the 15-day suspension affirmed by the law judge as a minimal sanction under the circumstances of this case, and one which is not inconsistent with precedent.¹⁴ No reduction is warranted based on the factors cited by respondent.¹⁵ The Administrator's withdrawal of an additional charge (14 C.F.R. 135.21(a)) several days prior to the hearing,

¹³ We note that respondent's claim on appeal that he inspected the nacelle cap from inside the aircraft and insured that the tabs were down is somewhat at odds with his testimony at the hearing, and also belied by his own reaction to the incident.

While respondent testified that he looked out the right hand cockpit window "to make sure that everything . . . looked okay from that position and nothing looked out of place" (Tr. 151), he made no mention of specifically checking the tabs, and he further explained that the purpose of this look was not to examine the fuel tank caps, but to check that all was clear on the right preparatory to starting the engines. (Tr. 160.) Moreover, we think respondent's apparent acquiescence to the reinstallation of the same cap he had purportedly seen securely fastened just a few moments before implies an acknowledgment that carelessness, as opposed to equipment failure, was the likely cause of the lost cap.

¹⁴ Though a different regulatory violation was at issue (14 C.F.R. 121.315(c)), we note that we have affirmed suspensions of 20 days to 30 days in cases where crewmembers have failed to properly perform pre-departure checklists, including preflight inspections. See Administrator v. Kierstead, 4 NTSB 1591, 1593 n. 13 (1984), and cases cited therein.

¹⁵ Our sanction analysis in this case does not rely on the Muzquiz doctrine, which holds that when all of the violations have been affirmed, a reduction in sanction must be justified by "clear and compelling reasons." Administrator v. Muzquiz, 2 NTSB 1474 (1975). As we have indicated, most recently in Administrator v. Tweto, NTSB Order No. EA-4164 at 4-5 (1994), the traditional approach to sanction deference found in Muzquiz has been called into question by the Civil Penalty Assessment Act of 1992, and simple reliance on that doctrine may be insufficient to sustain a sanction.

standing alone, provides no basis for a reduction, as the charges in the amended complaint fully support the requested sanction. Nor do respondent's increased piloting experience and responsibility and his attainment of an airline transport pilot (ATP) certificate subsequent to this incident provide a basis for reduction. Respondent was, at the time of his infraction, a commercially-rated pilot who cannot be presumed to have been less than fully aware of the significance of the preflight duties assigned him.¹⁶ Finally, we see no reason to mitigate the sanction in this case based on the carrier's issuance of a memorandum following this incident alerting crews to the importance of monitoring aircraft fueling and ensuring that fuel caps are properly secured prior to engine start. (Exhibit R-9.)

¹⁶ CF., Administrator v. Cooper, 1 NTSB 385 (1968); Administrator v. Guinn, 1 NTSB 1260 (1971); Administrator v. Rodgers, 1 NTSB 1496 (1971).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 15-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.¹⁷

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁷ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).